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THE CONSTITUTION OF THE UNITED STATES, AS MODIFIED IN THE CIVIL WAR.

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The Constitution of the United States is one of the greatest monuments of human history. It was not a sudden creation, according to Mr. Gladstone's hasty generalization; for our scholars agree that it was a growth essentially. It is perhaps the greatest achievement recorded of compromise, which is the genius of political development. Cherishing theories of Aristotle and Montesquieu, nourished by the Common law and English political experience, strengthened by the steady progress of the colonies, the statesmen assembled in the convention of 1787 embodied the knowledge of their time. The serene Washington, the practised and facile Franklin, the far-seeing constructive Hamilton, with Madison, Wilson, Morris, Sherman and their fellows filing in; these makers of the constitution brought the largest capacity to the conformation of a written instrument, which embodied the widest experience in the art of government.

The pregnant phrases of the Preamble—forged out by Hamilton and Madison—though they soon became important guides to the meaning of the whole instrument, do not appear to have attracted much attention or excited discussion.¹

It may be instructive to consider the ideas of J. Randolph Tucker, expressed after the facts of the Civil War had illustrated the genius and force of the original Constitution. Liberty if the "gift of God!" and the body-politic is "man's trustee, not his master."² As the body-politic rests on rightful sovereignty, the *de facto* institution must be taken to be the sovereign power. His great authority, Bluntschli, says "each man is at the same time member of the sovereign and subject to the sovereign."³ He sets forth the essential char-

¹ Thorpe, *Constitutional History U. S.*, v. 3, p. 467.

² Tucker, *Constitution U. S.*, vol. I, p. 14.

³ *Ibid.*, p. 57.

acter of legitimate government: "The supremacy of the Constitution-making power over all acts of government, lies at the foundation of our political law, and is, in its full force, the great American discovery in the science of government."⁴ Very forcibly he condemns usurpation: "The idea that usurpation is necessary or a supposed extension as a consequence of custom or progress of society can make jural any power not constitutionally conferred, is contrary to American political science, fatal to the liberties of the people."⁵

The actual results of the Civil War are nowhere better stated. It "decided the restoration of the Union under the Constitution as a whole—the bundle of burdens and of benefits. To that decree the seceding States bowed as final . . . the war itself did not change the Constitution in any of its terms or provisions, has been fully sanctioned by the decisions of the Supreme Court."⁶

These profound conceptions come to us as the product of time, but their germs were planted in 1787, in the formation of the instrument, which we are now to investigate.

It is agreed that our present organization is a national and federal government, combining the States and based on democracy. In the beginning, democracy was not developed so far.⁷ The convention of 1787 was an advisory body only, assembled with indefinite powers, which were delegated from the sovereign power of the States. Direct ratification by the people or a plebiscite could be attained only through the States. Virginia, New Jersey and Pinckney of South Carolina submitted plans. The initiation of the convention is ascribed to Alexander Hamilton who had elaborately advocated national consolidation to Duane seven years previously; an idea shadowed forth by Franklin in 1775. The practical

⁴ *Ibid.*, p. 62.

⁵ *Ibid.*, p. 67. And on the limitations of governmental power he cites two great authorities. "C. J. Chase adds to Marshall with great force. And if the property of an individual cannot be transferred to the public, how much less to another individual." *Ibid.*, p. 77.

⁶ *Ibid.*, p. 339.

⁷ Tucker, vol. i, p. 318; Thorpe, vol. i, 305.

formation of the convention is due to Madison and his skillful management. Hamilton said little until after much debate, for his theories of national power were hardly supported by his own State. He then submitted a scheme condemning both the leading plans, especially that of New Jersey. Briefly he would exclude State sovereignty, "for a federal government was an association of independent communities in one."⁸ There was much interesting discussion, and not altogether along sectional lines in general, as is often supposed. Representation and taxation of slaves gave much trouble. Roger Sherman disapproved importation, but thought it best to leave the matter as the Convention found it. Importation of slaves was finally continued, largely through South Carolina and Georgia, for Virginian interest did not lie that way. No one thought of prohibiting slavery. The true opposition in debate was against the hard, bony structure of a federal government; in this regard individuals from every section put forth strong objections.

The early discussions⁹ might be termed heterogeneous exposition. They revealed personal and local characteristics, conveying impracticable notions; which fell away after sensible recognitions and conciliatory consideration of the inevitable grand categories, into which Hamilton and Madison had already cast the future of the national government.

State Right and jealous reservations of State prerogative at first underlay the action of almost all the delegates North or South. Property as well as slave representation instead of purely popular representation, at times nearly sundered the assembly. Perhaps Gerry of Massachusetts was most conspicuous in distrusting democracy, though his fellows were numerous and willing. The jealous opposition of small States to the necessary power of the larger, loomed up at every turn of debate. Since the changes wrought by time and progress, we are astounded that New York aligned herself to protect her

⁸ *Ibid.*, p. 376.

⁹ Details of the Convention are taken broadcast from Thorpe's first volume.

small neighbors. Rufus King said generously he would never "accede to a plan of inequality (i. e. through representation) which put ten states at the mercy of Massachusetts, Pennsylvania and Virginia. Roger Sherman of Connecticut was a firm believer in State sovereignty and would have submitted the Constitution to ratification by States, when Madison demanded a plebiscite. Martin of Maryland thought the purpose of the general government should be to preserve the States, not to govern individuals. Ellsworth of Connecticut, while acting for State sovereignty, really contributed a principle of largest national import. He said that the people would reluctantly submit to a Constitution which disfranchised them, and that States were the best judges of the circumstances of their own people, and of the qualifications of voters.

The timely prohibition of taxes on exports—natural to us—was a rank innovation then, in spite of Adam Smith's arguments against them. The matter was debated with prejudice, rather than discreetly. Wilson, the ablest constitutional lawyer and a stronger nationalist than Hamilton even, urgently supported a tax. A tribunal of last resort to regulate relations between the States and central government was delimited vaguely in Article IX, the powers of the judiciary being but dimly indicated. The authority of the Supreme Court was elastic rather than definite.

After much forlorn debate including efforts to adjourn—nominally to consult constituents—a crisis was averted by appointing a Committee on Detail of Five; or as we should say, a steering committee, on which South Carolina, Virginia, Massachusetts, Connecticut and Pennsylvania were represented. Selections for committees were personal rather than sectional, being all made by ballot. It shows how fully the controlling ideas of Hamilton and Madison had permeated the Convention through debate that neither was placed on this influential committee. Discussion went on meanwhile, and in some days the committee reported an actual draft of the Constitution.

Much difficulty had been overcome in adjusting principles

of representation, in the qualifications both of voters and representatives to Congress. Some would have had a landed estate prescribed for all members of the government. But the shrewd Franklin said some of the worst rogues he had known—had been rich. Into slave representation, the personal element entered, but the factor of property occasioned quite as much trouble. Hamilton and Madison favored immigration, but the majority foreshadowed the modern "Know Nothing," literally. Curiously, Dickinson, Morris and the nationalists mostly inclined to a restricted franchise. Discussion opened wide difference of opinions, which might have fettered the United States. Franklin wisely disliked anything tending to "debase the spirit of the common people." With Ellsworth, Mason, Rutledge, as representing Connecticut, Virginia, South Carolina, he believed in extension of suffrage, and these men comprehended the true genius of America.

The times were far from comprehending the outcome of a solid control of "army and navy," likewise of the State militia. When we consider the tenacious antagonism of the fathers to monarchical or imperial government, we may wonder at their liberal treatment of this important detail. It was arranged "to raise and support armies," and provide a navy; while authority over the militia gave much difficulty, owing to State reservations so often mentioned. Mason and Pinckney would give control to Congress, while Dickinson, Ellsworth and Gerry believed the States would hardly surrender it.

The American Executive of the twentieth century was as little imagined or apprehended then, as the constitutional regulation of the planet Mars. Constituting the office caused much labor, and the method of election to it, even more. The Convention followed largely the precedents in State governments. The States seemed to agree on unity in the Executive better than on most points. The title of President was the oldest used in America. An Executive Council was much mooted, among other checks to restrain the government. We must remember that we are viewing the government of the

United States after long and successful operation. To the fathers, it seemed essential to impose all possible checks and balances. In rejecting an Executive and advisory council, Mason said they were experimenting, for even the Grand Signior had a Divan. Franklin, Wilson, Dickinson and Madison favored, but only three States finally voted for this restriction of the Executive. Participation in legislation had been scanty in the practice of Colonies and States; such conduct reverted to the ways of the early English kings. The veto was instituted at last, after much dispute. Gerry considered that the holding of the presidency of the Senate by the Vice-President, would be dangerous on account of his inevitable intimacy with the President.

The Committee of Detail quietly entertained many clauses, debate would have rejected. Later on, the pregnant and famous sweeping clause authorized Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc.

A final Committee on Revision was raised—Hamilton and Madison serving—and it assigned the whole written expression to Gouverneur Morris, a master of style. Urging the adoption of the revision, the veteran Franklin contributed a moving letter begging that every member "would with me on this occasion doubt a little of his infallibility." It was considered that this pathetic appeal turned the scales. Yet only little Delaware and Pennsylvania—justifying its proud title of Keystone State—signed the Constitution through every delegate. The punctilious Mason, the hypercritical Gerry, the juridical Ellsworth, the broad Dickinson, all failed to approve.

Whatever the Convention intended, it made a firm Union, which gathered strength as government went on, endured wars and survived the perils of prosperity. The same laws control the relations of Union and States to-day, as prevailed in the Constitution of 1787.

Twelve amendments—added up to the year 1804—which worked out principles, did not change the character of the instrument. In the early part of the century Chief Justice Marshall developed the latent federal powers of the Constitu-

tion, first instituted by Hamilton, with far-reaching effects, as we shall see.

The Missouri Compromise in 1820, the legislative agitation concerning slavery 1850-1854, the Dred Scot decision of 1857, all tended to aid new popular conceptions of the Constitution. As Mr. Wilson¹⁰ suggests "the life of each succeeding generation must inevitably be read into" the written instrument. Extreme Southern leaders thought secession both a sovereign and a legal right.¹¹ Mr. Willoughby¹² finds in their conceptions of the States "individual and sovereign political entities."¹³ According to Wilson, the men of the South did not intend a serious war but they meant to bring about a constitutional crisis. Neither legislative nor juristic process could satisfy their political desires. The sources of the constitution were not juristic,¹⁴ and revolution only could produce a new birth.

Manifestly, both South and North did not comprehend the developing powers of the constitution as interpreted by Marshall, which inevitably must exert new vital force in its own protection. The defeat at Bull Run, instead of overcoming the North, as the South hoped, only stimulated new political effort as a constitutional sequence. Congress proclaimed that "the maintenance of the Constitution, the preservation of the Union and the enforcement of the laws are sacred trusts, which must be executed." The attack on Fort Sumter immediately caused the Executive to put forth powers not expressly conferred by constitution or laws.¹⁵ This true survival of the kingly power was fully sustained by the people, though its exercise was hardly anticipated by our forefathers.

The Civil War brought great change into every department of the government. Perhaps the judiciary yielded least, and

¹⁰ *History American People*, vol. iv, p. 201.

¹¹ *Ibid.*, p. 190, and Burgess, *Civil War and Constitution*, vol. i, p. 75.

¹² *American Constitutional System*, p. 12.

¹³ *American People*, vol. iv, p. 208.

¹⁴ Burgess, *Political Science and Constitutional Law*, vol. i, p. 108.

¹⁵ Burgess, *Civil War and Constitution*, I : 228.

reverted most steadily to its original courses. Suspension of the writ of habeas corpus by the President excited violent discussion. It was claimed that it could be suspended only through act of Congress. This was technical, as Congress finally gave the President ample and explicit authority. It seems to be impossible to fully protect personal liberty by nullifying arrest, and to guard the state against secret treason in the same statute. William III "wrongfully" suspended the writ in 1696, thereby saving his own life and preventing invasion of England. Parliament thanked him for exceeding his lawful authority.¹⁶

Emancipation was not a constitutional process, though its effects prevailed in modifying the instrument. The changes in the constitution were inherent, through the 13th, 14th and 15th amendments, abolishing slavery and granting new rights—both to persons and property; and were generative through a new spirit created out of the life of the time.

Thaddeus Stevens, the "most dominating spirit Congress had ever known"¹⁷ imposed the fourteenth amendment, intending to bring about "dominance of negroes in the South,"¹⁸ by principles in the Constitution itself. The negro vote followed in the 15th amendment. Results actually attained for the negro, differed much from the anticipation; but enormous changes were engendered in the condition of persons and property. States were not dwarfed into municipali-

¹⁶ I am indebted to W. E. Foster for suggestion in this matter. Providence Public Library has a large collection of original pamphlets, giving opinions of Binney, Curtis, and many others on these disputed points bearing on constitutional development. Horace Binney contended (*Privilege of the Writ of Habeas Corpus*, Philadelphia, 1862, p. 52): "The Constitution intended, that for the defence of the nation against rebellion and invasion, the power should always be open (*i. e.*, of suspension of writ) in either of these events, to be used by that department, which is the most competent in the same events to say what the public safety requires in this behalf. The President being the properest and safest depository of the power, and being the only power which can exercise it under real and effective responsibilities to the people, it is both constitutional and safe to argue that the Constitution has placed it with him."

¹⁷ Thorpe, 3: 404.

¹⁸ Wilson, 5: 58.

ties as Randolph Tucker¹⁹ shows. Yet the fundamental relations of the federal government and the States have been agitated to the foundations.²⁰ Now, the courts have given the widest interpretation of "liberty" to the citizen. Citizenship was not defined in 1787.²¹ According to Thorpe,²² one of the greatest constitutional results of the Civil War is that sovereignty abides with the constituency and not with the agent; "that it exists with the people of a State and not in the State as a Corporation." The constituency are safe, as Tucker proves by citing Cooley, for legislators have their authority measured by the Constitution.²³

As in 1861, poor Sambo carried his masters and his northern brethren far beyond the intended revolution, so in the constitutional amendments, he opened unknown paths and possibilities in civic development. The Slaughter House Cases soon swept away the fancied legal distinction between black and white men. Turning to a great field of governmental energy, that practical agency of federal and State relations, known as the police power, let us consult Freund.²⁴ He regards the restraining influence of the original constitution on the police power of the States, as more important than the opportunity for positive police legislation on the part of Congress. From causes we have observed in our study the fathers did not mean to subject outright the State police power to federal control. On the other hand, the fourteenth amendment—though wisely limited by the courts—was capable of subjecting all legislation to federal control.

We now come to the present regulation of interstate commerce. Here, as in the larger political principles involved, Marshall had laid sure foundations when he declared in *Cohens vs. Virginia* that the United States were a single Nation. This pregnant decision was better comprehended after the national development in 1865. The courts discov-

¹⁹ Tucker, 2: 848.

²⁰ Baldwin, *Two Centuries American Law*, p. 36.

²¹ Willoughby, p. 241.

²² Thorpe, 3: 522.

²³ Tucker, 1: 379.

²⁴ *Police Power*, p. 65.

ered then that the national and State courts were sovereign in their own jurisdictions, but each was not sovereign in the objects committed to the other.²⁵ Moreover Justice Bradley declared in 1887 that the legal development of the last fifteen years had obliged the Supreme Court to revert to Marshall's fundamental principles, even to the modification of action by the Court in the intervening period. "Tom Scott," in the opportunity of the Civil War, developed systems of long and combined transportation, ready to be fitted to the new commercial necessities. The regulating act adumbrated in 1866 was passed February 4, 1887, and it regarded especially the long and short haul and non-pooling. So confused was the discussion that a member finally termed the act "one which nobody understands, nobody wants, and everybody is going to vote for."²⁶

The fundamental rights of property were protected against State interference by the federal power.²⁷ This has now become of practical effect. For example, much harsh legislation against Corporations in Texas was overthrown. On the other hand, a law of Texas forbidding railways to allow Johnson grass or Russian thistle on roadbeds was sustained by the Supreme Court which remarked "some play must be allowed for the joints of the machine."²⁸ Justice, though blind, usually comprehends the situation, and in this instance person and property were both involved. The far-reaching effects on federal and State relations are gradually becoming manifest. In November a decision in a Kentucky case is reported, which changes one branch of State taxation. Hitherto in many of our States domiciled inhabitants have been taxed on all their personal property wherever situated; in other words, for property in another state, it was a tax *in personam*. The U. S. Supreme Court held that "the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax."²⁹ Surely this is justice.

²⁵ Thorpe, 3: 521.

²⁶ *Judson Interstate Commerce*, p. 4.

²⁷ *Ibid.*, p. 50.

²⁸ *Ibid.*, p. 143.

²⁹ Simeon E. Baldwin, *Yale Review*, 15: 255.

As the nineteenth century waned, new and enlarged powers were prevailing in the commercial world. In 1787, foreign commerce was the immediate cause of failure in the Confederation and of calling the Convention. A century passed; there came a commerce even greater than the foreign. Noah's Ark and the Great Eastern alike had been superseded; yet greater were the changes on land. The twenty-one-foot iron rail laid after the manner of English turnpike to accommodate a possible farmer with his own steam-wagon had stretched 3000 miles across a continent. Fraught with larger consequences, were the alliances merging rails into systems tens of thousands of miles long. The wealth of Ormus and of Ind sought by Columbus, dwindled beside the loads of merchandise summoned by the genius of steam.

Among other great principles emphasized and formulated, the Supreme Court by mandatory injunction affirmed that rest was injurious; that "traffic must flow as it is wont to flow."³⁰

In 1895, the law of common carriers was enlarged by the Court, "not changed" to regulate steam-transportation in a pregnant saying. "The constitution has not changed." "But it operates upon modes of interstate commerce, unknown to the fathers, and it will operate with equal force upon any new modes."³¹

None of the changes induced by these processes are of greater import than the regulation of railway rates. By the Elkins amendatory act of 1903 "the public rate is the legal rate and all rebates are unlawful." Under this act corporations are being incriminated, but a new and stringent statute was added last winter. By the "judicial process of inclusion and exclusion," these mighty throbs of the interstate pulse will be harmonized ultimately.

These railway corporations, subject to double obligations are fairly liable to governmental control, but "power to regulate is not power to destroy."³² Monopoly needs close

³⁰ Judson, *Interstate Commerce*, p. 127.

³¹ *Ibid.*, p. 4.

³² Noyes, *American Railroad Rates*, p. 3.

watching, but it often serves the public better than competition. The matter is difficult, for the practice of rating on the value of service—"all the traffic will bear"—comes from the old English canals, which took the heaviest tolls on most valuable goods. There is consequent local discrimination. But it has been proven that some legislation is necessary, and railways must help conservative legislation.³³

Judicial process only can determine the effect of our late legislation, but we may consult the opinion of one versed in the experience of the Interstate Commerce Commission. Mr. Prouty says ³⁴ it will "prevent more than it will correct." That the payment of rebates will mainly cease. That "discriminations between localities will largely continue, and this will be the most fruitful source of complaint in time to come." How can it be avoided "unless waterways can be shut up and geographical position ignored?"

Perhaps, the greatest constitutional lesson for our generation educated by the Civil War, is furnished by the principle of a resultant in political and legal development. Legislators are practically circumscribed by expected results, while a resultant includes unforeseen impulses. When one taps a billiard ball, the direct stroke, the oblique tendency of a whirling sphere, the deviating incidence of angles, above all, the temperamental impulse of the player, combine in a final movement, which though finite surpasses the imagination. Though political and juristic results are finite, they bewilder finite minds.

The Revolutionary War culminating in the Constitution only made the federal government a "passive non-infringer of individual liberty."³⁵ According to Judge Baldwin ³⁶ "a new burst of idealism followed the Civil War." The framers of the fourteenth amendment sought and gained a new foundation of all personal rights, in the support of the Judiciary. A momentous innovation, for history had not so vin-

³³ *Ibid.*, p. 259.

³⁴ *American Review of Reviews*, July, 1906, p. 70.

³⁵ Burgess, *Political Science and Constitutional Law*, 1: 185.

³⁶ *Two Centuries American Law*, p. 27.

licated the person in clan-growth, feudal organization or delegated suffrage. Legislators then fondly expected to lift the black man bodily into all the powers of citizenship, even if whites were incidentally oppressed.

What was the resultant? Negro protection and development have been remanded to State control, as rigidly as Randolph or Roger Sherman might have desired. In another direction, Congress and the Courts are exceeding any legal conception possible fifty years ago, as they fashion and secure resultant privileges for property and commercial development. Call it providence, call it evolution—these ways are exceeding strange.

We need the powers of Hamilton and the great makers of the constitution to interpret the whole scope of the instrument, after the development of more than a century. The government created by the constitution has survived the conflicts of war, internal crises, and the greater perils of prosperity. Inasmuch as the written instrument embodies the conscientious, vital force and expanding power of a great people, it looms up more largely than ever in the advancing drama of the civilized world.